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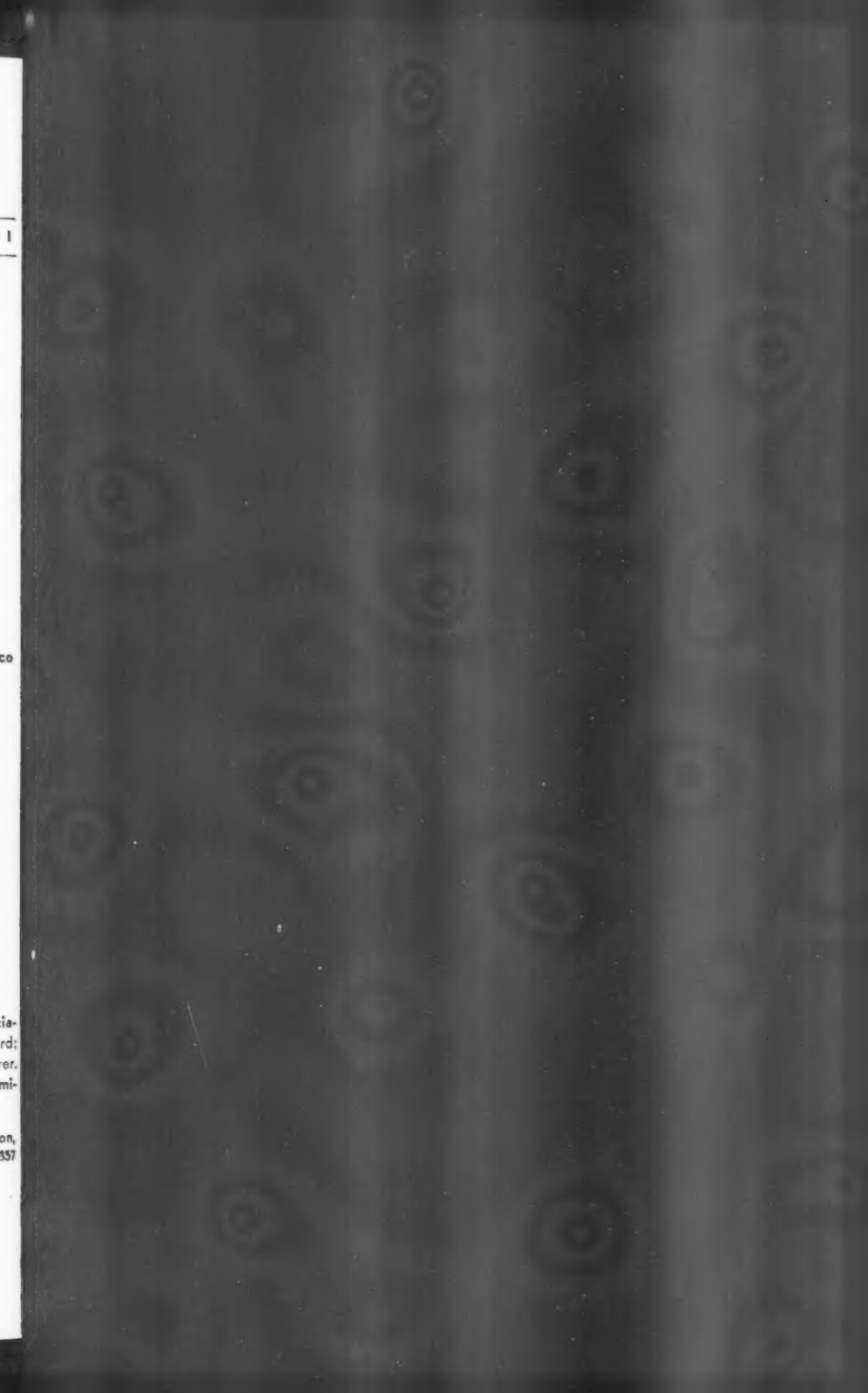

AN EDITORIAL

"OUTSIDE the area controlled by statute," wrote Archibald Cox,[1] the well-known Harvard professor, arbitrator and now Solicitor General of the United States, "there is no more important treasury of experience than the record of grievance arbitration. Surely arbitrators have not labored at the administration of collective bargaining agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree, even though partisan interests preclude unanimity."

The search for "some generalizations" to guide labor and management in formulating policy and in predicting the outcome of grievances has been going on for many years. That this should be so is completely understandable, for some degree of predictability is essential in any forum of adjudication. This is not to say that absolute guarantees of the outcome of controversies are either possible or desirable. It does mean, however, that parties must have assurance that the decision, whether for the claimant or the respondent, will fall within an established tradition and will not represent the whim, caprice or eccentricity of one man. In other words, a court of law or a private tribunal of arbitration must be essentially a *conservative* force.

This conservatism, in courts of law, operates through the doctrine of *stare decisis*—adherence to established precedents. Arbitrators are of course not bound by precedent. But the influence of arbitrators, too, is conservative. The only difference is that where judges follow decisions of other judges, arbitrators look to the past practice of the parties. An important fact often overlooked by the disappointed party who occasionally complains about an award is that arbitrators are usually unwilling to innovate. Solutions are always sought within a framework established by the parties themselves. The fact that a company and union have followed certain procedures or applied certain standards is almost always sufficient reason for leaving those practices unchanged, even when they offend the arbitrator's sense of justice.

A case in point was a decision by the late William N. Hepburn reported in the American Arbitration Association's *Summary of Labor*

1. *Law and National Labor Policy*, by Archibald Cox. Institute of Industrial Relations, University of California (1960), p. 72.

Arbitration Awards.[2] It had been the custom of the employer to deduct sums from the wages of employees for materials lost during the manufacturing process, even though the loss was not attributable to errors or faults of those employees. "As a matter of abstract justice," Professor Hepburn wrote, "it is not easy to defend a system which imposes on an individual or a group financial 'penalties' without proof of fault or even of actual power to control, unless specifically authorized by the contract or by individual employees." But the practice has been in effect for a long time, he added, during which time many contracts were negotiated. "I do not think I should change it in this proceeding. Complaints and dissatisfaction regarding this problem should be referred to negotiation rather than arbitration."

It is perhaps in the discipline cases that arbitrators are most often accused of substituting their judgment for that of the employers. And if one were to judge only by the number of cases in which penalties were revoked or reduced, it might appear that the accusation is well founded. But when one examines those cases more closely, it becomes apparent that the reason for the mitigation of penalties was not the arbitrator's preference for lighter punishment but his insistence that discipline be consistent within the standards established by the employer himself. Seldom is disciplinary policy and practice the same in different establishments. In one plant, disobedience of a work order, use of improper language toward management or drinking on the job may be cause for immediate discharge. In another, the employer may have been more indulgent with such conduct, regarding

2. 12 AAA 22.

(*Continued on Page* 36)

AMONG OUR CONTRIBUTORS

DANIEL GUTMAN, Dean of New York Law School, was appointed President Justice of the Municipal Court in New York in 1954, after more than a decade of service as a judge of that Court. He was Counsel to Governor Averill W. Harriman of New York from 1955 to 1958. FRANK J. MURPHY, S. J., is Director of the Institute of Industrial Relations of Rockhurst College, Kansas City, Missouri. His article in this issue of *The Arbitration Journal* is based on research he conducted while a student at the New York State School of Industrial and Labor Relations. MAX H. BRESCH, a British solicitor, is Secretary of the Committee on International Commercial Arbitration of the International Law Association. BENJAMIN BUSCH, a partner in the New York law firm of Katz and Sommerich, is co-author (with Otto C. Sommerich) of "Foreign Law: A Guide to Pleading and Proof."

ARBITRATION IN THE NEW YORK MUNICIPAL COURT

by Daniel Gutman

In February of 1959, the writer was appointed President Justice of the Municipal Court of the City of New York. As a judge of the Court, and previously, while serving as a legislator and during the early years of trial practice, I had been concerned over the fact that the trial of small claims was very costly to litigants. The Small Claims Court has jurisdiction over cases involving up to $100.00 in amount. Most of the actions that are instituted there are for less than $50.00.

A great deal of time had to be devoted to the trial of these cases. In each borough, judges were assigned to the "Small Claims Part." Two official referees, former Justices of the Court, were also assigned to this Part. The volume of business was and still is substantial.

During the ten years in which I sat as a trial justice, I observed that many cases were discontinued because the parties, unable to obtain a trial or effect a compromise, felt that repeated appearances in court were too costly. Adjournments were frequent despite the firm policies that some of the judges attempted to invoke. For example, on the return day, plaintiffs were generally ready to proceed to trial; the defendants, however, were entitled to one adjournment almost as a matter of course. Thus, if they requested a bill of particulars or asked for an opportunity to engage counsel, such requests could not properly be denied.

Every known type of application for adjournment was resorted to; requests for particulars, additional particulars, illness of the party, illness of his counsel, illness of a child of the party, illness of counsel's child, wife, old aunt who lives with him; death of friends, relatives of even closest friends, and so on down the line. It was almost always possible for a defendant to cook up an excuse supported by affidavit, sufficiently appealing emotionally or compelling, legally, to obtain a second adjournment; marking cases ready "peremptorily" against a chronic adjournment-seeker was often effective.

One noticed, reviewing the records, that many parties did not return for a third visit to the court. Two wasted mornings were more than enough. Plaintiffs would forego a just claim; defendants would

comply with an unjust demand; anything to avoid the cost of leaving one's shop or store or going to the expense of engaging a baby-sitter for another morning.

I coined a slogan during those years and determined that if I could possibly bring it about, I would some day make it a reality; namely, that in New York City it should not be necessary for a man to "lose a day's pay to recover a day's pay." Although this, of course, represents only one side of the type of litigation involved, it summed up my thinking.

Immediately after my appointment, I had organized an "Advisory Committee" to the President Justice. This consisted of representatives of each of the bar associations in New York City, the attorney-in-chief of the Legal Aid Society, a representative of the Central Trade and Labor Council, a representative of industry, an assistant to the Mayor, and a representative of the American Arbitration Association in the person of Israel Ben Scheiber, an outstanding member of its Labor Panel.

Most of the members of the Committee were men with whom I had enjoyed previous association. In particular, I had been a clerk in Mr. Scheiber's office for an apprenticeship which started months before I entered law school and continued until shortly after I was admitted to the bar.

One of the first items of business to be taken up with the Advisory Committee was the matter of establishing a Night Court for the Trial of Small Claims. This, I thought, would help to overcome many of the problems created by the great congestion in that Part of the court and also help to relieve the work-load of the judges and make available more judges for the handling of the clogged calendars.

Mr. Scheiber arranged for both of us to meet with J. Noble Braden, the then Executive Vice President of the American Arbitration Association. We conferred at the Association's offices and discussed at length plans for introducing arbitration practices to the Municipal Court. As a result of that helpful conference, it was decided to do so. For this purpose, it was necessary to have a substantial number of lawyers volunteer their services. Since the City was on an economy wave and I had been requested to cut $73,000.00 from a "trimless" budget, it was impossible to ask for any appropriations. This job of saving time and money and of alleviating tension for disputants over small amounts had to be done without more expense.

A large reservoir of arbitrators was necessary in order to avoid

too frequent appearances in this quasi-judicial capacity, of lawyers who practice in the courts regularly.

In June of 1954, I wrote a letter to the New York Law Journal asking for experienced lawyers, admitted for more than five years, to sit as unpaid arbitrators in night sessions on small claims cases. To make this service more attractive they would be designated as "Referees." I was warned not to expect a great response, but within a few weeks more than 300 well-qualified attorneys volunteered.

The Association of the Bar of the City of New York had agreed to screen all applicants for this service. A schedule of assignments was prepared for those who had been approved in this manner. Five or six referees were to be assigned each night, in addition to which there would be one justice of the court to preside over cases where litigants refused to submit their claims to arbitration. I made it my business to attend court each evening, and, when the work-load was heavy, to preside over trials.

Court attendants, clerks and stenographers agreed to work at night without additional compensation. In return, they were allowed compensatory time off.

Among the Referees were some of the outstanding members of the bar, including the former president of the Association of the Bar of the City of New York, Mr. Allen T. Klots. Members of law school faculties and a number of legislators and former judges were among the referees.

In each case, the litigants and their attorneys were required to sign a stipulation submitting the matter to arbitration; the arbitrator took an oath before the judge who was sitting in Part I; the decision was entered under an "arbitration award"; payment of judgment in installments was provided for in cases where the circumstances so warranted.

In September of 1954, the opening of the Night Court for the Trial of Cases in the Small Claims Part was marked by public ceremonies. Presiding Justice David W. Peck of the Appellate Division of the First Department declared at that time: "This is one of the most significant events of all time in the history of the Judiciary of this State and, certainly, of this City." Five years later, in 1959, Mayor Robert F. Wagner marked the fifth anniversary of the Civil Night Court in ceremonies at City Hall. Addressing the Referees, he stated:

"You have made possible the continuance of a major service

to the people of our City, It is, in fact, the outstanding feature of our judicial system that here a person may sue to recover a small claim, or come into court to defend an unjust claim, without losing a day's wages in the process of doing so."

Before the end of 1954 the Night Court was extended to the Borough of Brooklyn, and the same system of arbitration was put into effect there.

Some idea as to the volume of business which was handled in the Small Claims Part before and after the establishment of this system of arbitration is conveyed by the following chart:

Year	*Actions Filed*
1953	32,438
1954	30,808
1955	53,098
1956	48,122
1957	43,975
1958	43,764
1959	43,052
1960	41,417

In 1956, over 13,000 arbitration hearings were conducted by referees in the Small Claims Part of the Court.

The beneficial effects of this system were self-evident. For one thing, several judges were released for service in other trial parts and were thus able to assist in reducing the calendar backlog which had confronted the Court in the early part of 1954. The savings in costs to litigants is great; lawyers who, frequently against their will, are obliged to prosecute or defend small claims, are now able to do so without the sacrifice of valuable day-time hours. Not the least important of the benefits is reflected in an atmosphere in which the tensions and overt antagonisms that have always marked the sessions in crowded courtrooms, have been visibly relaxed. The anxieties of those who must rush back to business, shops or homes, or face a loss greater than the amount at issue, have been eliminated.

The activities of the court do not always go unchallenged. In 1955, an appeal was taken from a order denying the motion of a defendant to set aside a judgment entered upon the Referee's decision and award in the case of Trager vs. Abilene. Supreme Court Justice Samuel H. Hofstadter, in an opinion in which the Justices of the Appellate Term, First Department, unanimously concurred,

reviewed the system of selecting arbitrators and the ensuing proceedings. He held that the "procedures followed in the Small Claims Court, pertaining to the hearings of cases on consent before arbitrators, falls within the powers granted to the Municipal Court and is in compliance with its rules." He continued:

> "Defendant's arguments are based upon a wrong premise, i.e. that the hearings before the so-called referees in the Small Claims Court are judicial proceedings rather than arbitrations. The whole procedure followed clearly negates such a conclusion. Defendant was given a choice between a trial before a justice of the Municipal Court who was available for that purpose, or of voluntarily consenting to have the matter heard as a controversy by a designated arbitrator. The fact that the latter is called a 'Referee' does not alter the true situation. His duties and function are the governing factors and there can be no question that he acts only as an arbitrator. Defendant after being given its choice voluntarily entered into a written stipulation consenting to arbitrate and to be bound by the Municipal Court Rules pertaining to arbitrations. The language of the consent so signed is too clear to be misunderstood even by a layman, and in this case defendant's attorney signed the consent for it."

The effect of this unanimous decision of the Appellate Term of the Supreme Court has been to imbed the voluntary arbitration system in the New York City Municipal Court procedure. Since my retirement as President-Justice of that Court, I have been gratified to note that the arbitration procedures first introduced with the help of J. Noble Braden, the Executive Vice President of the American Arbitration Association, into what is often called the "poor man's Court" have continued to prove increasingly their effectiveness. They make it possible to provide just, speedy and a more and more acceptable method for disposing of claims which are small but, nevertheless, of great importance to the litigants of our City.

Since its introduction into our Municipal Courts, the arbitration procedure, in the handling of tens of thousands of cases, has proven itself of inestimable value in saving the time, the efforts and the money of the litigants.

For this, the people of this great City owe a debt of gratitude to the American Arbitration Association for its part in introducing arbitration procedures in our Municipal Court.

JOB CLASSIFICATION ARBITRATIONS UNDER BETHLEHEM STEEL AGREEMENTS

by Frank J. Murphy, S. J.

This paper is concerned with arbitration as it relates to one aspect of a wage and salary program, namely, job classification. It will look at the record of arbitration of cases involving job classification under the agreement between one large company, the Bethlehem Steel Corporation, and one large union, the United Steelworkers of America. It will sketch briefly the background, organization, and process of arbitration in this relationship. After summarizing the arbitration of cases on job classification from 1942 to 1952 under this agreement, as given in one study of them,[1] it will attempt to survey similar cases from the year 1954 to the present.

The general purpose of this brief review will be to understand better the process of arbitration in this particular area of wage and salary administration. It will seek to discover how the existence of such a formal plan influences the arbitrator's task and affects his authority and his interpretations. Basically, it will attempt to make clear the problems, limitations, and aids which such a program brings to the arbitration process. It will seek to determine the knowledge that the arbitrator needs in these cases and to discover the thinking and methods which he uses in deciding them.

In 1953 the Bethlehem Steel Corporation was the second largest steel producer in the United States with about 15 percent of the capacity of the industry. It had about 90,000 workers in its steel plants, fabricating plants, and warehouses. The greatest part of this work force was concentrated in the corporation's five largest basic steel plants which employed from 5,000 to 26,000 workers. The United Steelworkers of America had a high proportion of these workers as members.

1. U. S. Department of Labor, Bureau of Labor Statistics, *Arbitration of Labor-Management Grievances, Bethlehem Steel Company and United Steelworkers of America* 1952-52 (Bulletin No. 1159), p. v.

Under the 1942 and 1945 agreements arbitrators were selected on an ad hoc basis and many individuals were used. From 1947 to 1952, a panel of three arbitrators were used. In 1952 the parties inaugurated a system of a single permanent umpire. Under a Memorandum of Understanding of 1954, supplementary umpires can be appointed by the permanent umpire when the case load becomes too heavy for one man.

General Findings of the BLS Study

The Bureau of Labor Statistics study of 1953 reviews all arbitration cases occuring under the Bethlehem agreements between 1942 and 1952. The study breaks down the cases according to subject, type of action, and plant. It also gives a more detailed division in two tables of the two main types of cases, those concerned with wage and job classification and those concerned with seniority.

With respect to the action taken on the 1,003 arbitration cases between the years 1942 and 1952, 200 of the grievances were granted and 121 partially granted for a total of almost one-third.[2] Just about half of the grievances were denied; 503 to be exact. Thirty one cases were dismissed for lack of jurisdiction; 57 were dismissed as untimely. Of the 91 cases referred back to the parties for further negotiation or added information, 35 were settled or withdrawn and 56 were pending or the disposition of them was unrecorded.

With respect to the subject matter of the cases, 485, or almost one-half, pertained to wages or job classification. The disposition of this type of case followed that of the cases as a whole very closely. Seniority cases were second in number, equaling 303, and again the disposition of these cases adhered very closely to that for all cases. Other subjects involving a fair number of cases included discipline, 89; work force assignment, 53; job assignment, 14.

With respect to the 485 cases which dealt with wages or job classification, a further breakdown shows that 326 of these cases pertain to wage rates or job classification. Many of these involved incentive rates. New rates set by management were objected to on the basis of inadequacy because of workload or job responsibility. Increases in rates were requested because of changes in workload or job requirements, reduction of size of crew, change in method of earnings, and the like.

2. *Arbitration,* Bethlehem Steel and United Steelworkers, *op. cit.,* Table 2, p. 4.

The Job Classification Program

Prior to the agreement of 1947 which established the Job Classification Plan, wage inequities were a great source of grievances and cases. During the decade 1942-1952 the greater part of cases dealing with wage rates and job classification related to inequities, or to a lesser extent, to wage rates resulting from changes in a job.

In November, 1944, the National War Labor Board directed the company and the union, and other steel companies, to negotiate for the elimination of inequities and for a reduction in job classifications. These extensive negotiations resulted in the Manual for Job Classification.

Negotiators of this manual were given "guideposts" by the NWLB. These guideposts sought to develop simple and concise job descriptions in which jobs were placed in proper relationship to each other, and a reduced number of classifications with wage rates established according to the directives of the board. Under the program as developed, all jobs were classified into 30 classes with hourly wage increments of 3.5 cents between classes. These were raised to 32 and 5.5 in 1952. Job descriptions were developed and classified in the Manual on the basis of the following twelve factors: 1. Pre-employment training; 2. Employment training and experience; 3. Mental skill; 4. Manual skill; 5. Responsibility for materials; 6. Responsibility for tools and equipment; 7. Responsibility for operations; 8. Responsibility for safety of others; 9. Mental effort; 10. Physical effort; 11. Surroundings and 12. Hazards.

Within each factor was a series of alphabetical code gradations to which was assigned a numerical value depending on the degree of the particular factor contained under the code description. Each job could then be assigned a numerical rating for each factor according to the code descriptions for the various gradations. The job class was determined by the sum of the numerical ratings thus assigned for the twelve factors, rounded to the nearest whole number.

With the signing of the 1947 agreement, grievances over wage inequities were no longer permitted. The wage rate for each job classification was fixed in the contract. Only changes in the job itself could result in change in classification or incentive rates. The role of the arbitrator was considerably curtailed under the new agreement. He could find that the job was not rightly classified, but the rate for the new class to which the job was assigned was determined in the contract. He could establish new incentive rates as a result of changes in a job, but

could not establish these for jobs previously paid on a time basis. Two major criteria were to guide the arbitrator considering job classification changes. First, the job itself had to be changed as a result of one of the five events listed in Article V, Section 1, of the agreement. These five were: "(a) the creation of new positions, (b) changes in equipment, (c) changes in manufacturing processes or in methods or standards of manufacture or production, (d) the development of new manufacturing processes or methods, or (e) mechanical improvements made by the Company in the interest of improved methods or products."[3]

Secondly, once such a basis for a change in the job had been established, then the arbitrator had to determine whether the change was substantial as indicated by this clause in the contract: "An existing job shall not be reclassified, however, unless such changes or events shall alter the requirements of such job as to training, skill, responsibility, effort and surroundings to the extent of a whole numerical classification of 1.0 or more."[4] Thus, the change had to be at least sufficient to bring the job into the next job classification.

The only major change in the contracts in regard to job classification occurred in 1956 when Section 1, Article V, specifying the type of events or changes required before job reclassifications could be made, was dropped. Thus, the arbitrator no longer need find that one of the five mentioned events had occurred before he could consider the case. The 1956 contract specified the following conditions for a change in job classification or incentive rates: "the requirements of such job as to training, skill, responsibility, effort and surroundings shall have been altered to the extent of a whole numerical classification or more."[5]

1947-1952 Cases

Some account will now be given of the cases on job classification as cited by the Bureau of Labor Statistics study.

The case selected by the study to illustrate job classification grievances pertained to the assignment of the job of Theisen and Precipitator Operator to Job Class 8 after the introduction of new equipment into the cleaning division of the blast furnace department at the

3. *Bethlehem Steel Company and United Steelworkers of America, Agreement between,* April 30, 1947—April 30, 1949, p. 16.
4. *Ibid.,* p. 16.
5. *Bethlehem Steel Company and United Steelworkers of America, Agreement between,* August 3, 1956-June 30, 1959, pp. 16, 19.

Lackawanna plant. The Theisen Operators at Lackawanna had been given the additional duty of operating the new electric precipitators which had been added to the existing gas washers. The management, under its acknowledged right in Section 1, Article V, had created a new job to handle such duties. It had notified the union according to contract provisions and the latter, finding thenew classification unacceptable, had taken it to arbitration. Management had classified the new job in Job Class 8; it was the union's contention that the proper classification should be Class 11. Six of the twelve code values or factors were in dispute. Management choose the job of Assistant Scrubber House Operator at Bethlehem as a comparative job and assigned code values for the new job similar to that job. Company experts had studied both jobs and found great similarity between all the factors of the two jobs. The union suggested the job of Assistant Disintegrator Operator at the Johnstown Plant for comparison and challenged the company choice for comparison on general grounds. The arbitrator questioned the union's choice for comparison because there were some differences in factor codes assigned the two jobs.

On the specific coding of factors each side presented evidence to support its choice. The arbitrator accepted the company's designation on Factors 5, 8, 10, and 12, and the union's determination on Factors 2 and 9. The study has selected Factor 5, Responsibility for Materials, to illustrate the arbitrator's thinking in this case. The arbitrator called attention to aspects which must be considered in coding this factor: degree of care required to prevent damage to the materials handled and the monetary loss sustained from failure to exercise such care. Both parties were in agreement that $50 represented the maximum potential monetary loss, but the company thought that Code B, "ordinary care", with a point value of 0.3, was proper for the degree of care required, while the union felt that "close attention for part of the return" with a 0.5 value was proper. The arbitrator's opinion on this factor indicated that the installation of the precipitators did not substantially change the duties with respect to responsibility for materials and reviewed the basis for comparisons between the various suggested jobs.

With respect to cases of "employee" classification, the BLS study first cites an arbitration case in which the arbitrator clearly indicates the basis of his authority to deal with such cases. Involved was a worker classified as a Sweeper who said that he was performing the duties of the higher classed job of Laborer. The arbitrator said:

There is an important difference between reclassification of individuals and the reclassification of jobs. The latter function is reserved exclusively to the parties (with exceptions not relevant here). The former, however, is clearly arbitrable as an *application* of the established job classification scheme. The Master Agreement specifically provides for the arbitration of grievances involving the 'application of the provisions of this Agreement' (Article XI, Section 2). The provisions of the Agreement on Elimination of Wage Rates inequities, dated April 11, 1947, are incorporated into the Master Agreement by reference in Article IV, Section 1 of the latter. It follows that a claim like that of B is arbitrable. He is not seeking to increase the Sweeper's pay from the Class 1 rate to the Class 2 rate; instead he claims that he is actually performing the duties of a Laborer, which is already classified as a Class 2 Job.[6]

Another decision points out the difference between the upgrading of an employee which was based on "personal qualifications and ability" and the description and classification of a craft which was based on "the duties which a fully qualified craftsman may be called upon to perform in the department." In this case certain machinists classified Machinist Grade B asked to be upgraded to Machinist A or to be relieved of the duties of that grade. The arbitrator interpreted the union's position to be "that there exists three separate and distinct job classifications, each with its own specific work and duties, a Machinist A, B, and C." He denies this contention saying that "such a separate classification theory goes completely contrary to the job classification structure agreed to by the parties." The manual had set up a single, overall, craft classification with a single, written description for each craft, such as the Machinist in this case. There was no division and classification into Grades A, B, and C. The assignment to a particular grade within the craft was done by review based on personal qualifications and ability.

One basis for denial of classification grievances was that the arbitrator had no authority to pass on issues which involved changes before the agreement of 1947. With that agreement all jobs were considered as classified properly. The most frequent basis for denial of grievances was a finding that changes did not result in such a substantial modification of point rating that the numerical sum of the factors

6. *Arbitration, Bethlehem Steel and United Steelworkers,* p. 36.

increased a whole job classification or more. Sometimes this presented interesting decisions which while granting that the men had a greater workload, still did not give the arbitrator power to change classification. As one opinion said: "It is quite possible that the men must now work harder than they did in 1947, but the record does not show any connection between this fact and the criteria which the parties set forth in their Agreement." Increase in work-load by itself was thus not sufficient to justify a grievance. The two basic criteria had to be met: a change in the job as a result of one of the five events listed in Article V, Section 1; and a change of sufficient magnitude so as to alter the requirements of the job to the extent of a whole numerical classification of 1.0 or more.

1953-1959 Cases

The second part of this paper deals with arbitration cases which were heard after 1952, the cut-off date of the Bureau of Labor Statistics study. This will not be a statistically developed study of the cases since that date, but rather will attempt to give a representative cross-section of arbitration proceedings, including none for the year 1953.[7]

A case decided February 2, 1954, shows the manner in which the two main criteria guide the arbitrator. At the Sparrows Point Plant seventeen Car Repairmen A requested that they be upgraded two classifications because they now had increased responsibility as a result of the addition of equipment and there were changes in the type of work performed. The arbitrator could find no substantial change in the duties of these men nor any change or event within the meaning of Article V, Section 1 to give him jurisdiction. He said:

> As has been pointed out in many cases, the Agreement gives the Umpire no authority to direct a change in classification unless one of the five changes or events specified in Article V, Section 1 of the Agreement has occurred, or unless a new job has been incorrectly classified. None of the specified events has occurred, nor is the instant job a new one. Hence, the Agreement provides no basis upon which the Umpire might direct a change in classification. The Agreement clearly precludes the Umpire from considering the correctness of the original classification of a job.[8]

7. This file is located in the library of the New York State School of Industrial and Labor Relations, Cornell University, Ithaca, New York. No cases were found for the year 1953, but it is thought that for the succeeding years the file is complete.

8. *Bethlehem Steel Company and United Steelworkers of America, in the*

The interesting question can be asked whether under the 1956 Agreement which no longer contains Article V, Section 1, of the previous agreements, the arbitrator in this case would have had jurisdiction and would have ordered a change in classification. The answer seems clear that while he need no longer find one of the five changes to have occurred in order to handle the case, under the criterion which remains he nevertheless would not have found sufficient change to direct a reclassification. In the 1956 Agreement he could order reclassification when "the requirements of such job as training, skill, responsibility, effort and surrounding shall have been altered to the extent of a whole numerical classification of 1.0 or more. . . ." Practically, it would seem, such alterations could not develop without the occurrence of one of the events of Article V, Section 1. Possibly, this gives some clue as to the reason for elimination of that section: The change in contract made little difference in the final analysis.

Cases Involving Job Reclassification

A decision on March 24, 1954,[9] held that changes had resulted in an increase of only 0.7 points; the job could therefore not be upgraded. This job originally consisted of setting up and operating a group of machines for the pointing and stamping of studs and the grinding of external threads. Over the years a second thread grinding machine had been added, a hand operated chain hoist had been substituted for the prior crane arrangement used in changing the grinding wheels of the machine, and a comparator was added to enable the operator to make a better check of the threads and to adjust his machine. The union claimed that as a result of these changes an increase in Factors No. 2, 3, 5, 6, 10, and 12 was warranted raising the job 2.4 points from a rating of 8.3 in Class 8 to one of 10.7 in Class 11. The company agreed with the suggested change in Factor 6 to Code C and 0.3 points but contested the other increases. The arbitrator reviewed each factor as effected by the changes and agreed with the company in all except Factor 12, Hazards. He felt that the addition of a second grinder and the substitution of the hand-operated chain hoist warranted an increase

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Matter of Arbitration Between, Sparrows Point Plant, Opinion and Award of Impartial Umpire, Grievance No. 2711-7059, February 2, 1954, Charles C. Killingsworth, Impartial Umpire, pp. 3-4.

9. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. GAD-4, March 24, 1954, Lebanon Plant, G. Allan Dash, Jr., Impartial Umpire.

in this Factor from Base at 0.0 points to Code B at 0.4 points. However, his general conclusion was to deny the grievance, as the increase from the two factors (one admitted by the company and the other ordered by the umpire) did not constitute a change of "a whole numerical classification of 1.0 or more," as required by the contract. But he did recommend, by way of advice, that the parties restudy the job and try to adjust the factors and the job description. He did not think this would require a change in job classification.

A case dated July 23, 1956 at the same plant requested the upward reclassification of Operator-Bluing and Annealing Furnaces from Job Class 6, to which it had been assigned in November, 1947, to Job Class 9. The basis for this request was the changes which had occurred in the job in the meantime: the addition of another furnace, new material handling equipment, changes in testing procedures and clerical duties. The umpire could not find that these changes substantially effected Factor 2, the time required to become proficient in the job, or Factor 3, mental ability, job knowledge, or Factor 5, responsibility for materials, or Factor 7, responsibility for operations. He did agree to the union's contention for an increase in Factor 10, physical effort. However, this change would only raise the total numerical value 0.5 points, not enough to warrant a change in classification. The umpire also indicated what he considered the source of the grievance. "Many of the Union's contentions in this case seemed to the Umpire to be directed less at the effect of the *changes* in the job than at the *original* classification of the job. It should go without saying, however, that the Umpire is not authorized to review and correct in arbitration alleged errors in the classification of a job by mutual agreement."[10]

Another case concerning C & D Mouldman and Mouldman Leader, at the Lackawanna Plant, July 24, 1957, illustrates the specialized knowledge which an arbitrator often must have.[11] In this in-

10. *Bethlehem Steel Co. and United United Steelworkers of America,* Impartial Umpire Decision No. 230, Lebanon Plant, July 23, 1956, Ralph T. Seward, Impartial Umpire. The following quotation is found on pages 8 and 9 of the case: "Many of the Union's contentions in this case seemed to the Umpire to be directed less at the effect of the *charges* in the job than at the *original classification* of the job. It should go without saying, however, that the Umpire is not authorized to correct in arbitration alleged errors in the classification of a job by mutual agreement."

11. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. 334, June 24, 1957, Lackawanna Plant, Rolf Valtin Assistant to the Impartial Umpire, approved by Ralph T. Seward, Impartial Umpire.

stance he had to have a detailed knowledge of the equipment—what it was, how sturdy, how it was used—and of the standards used for coding in the Manual. He had to make comparisons of this job with other jobs. Likewise, he found inspection helpful in reaching his decision. The dispute hinged on Factor 6, responsibility for tools and equipment, and Factor 11, surroundings.

The union claimed that a slurry gun and an electric-powered mixer, not used in other Mould Yards, were used at Lackawanna and warranted an increase in rating for the tool and equipment factor. In addition, the union claimed that the heat involved in the work, which came from the extremely hot tops taken off the ingot moulds, warranted an increased rating for surroundings. The opinion of the umpire did not support the union's contention on either point. He found that the slurry gun and mixer were sturdy, non-delicate, and non-complex pieces of equipment requiring little care. The slurry gun was a pipe-like spray gun which in the umpire's opinion could hardly be damaged even if dropped. The mixer was a stationary piece of heavy and solid construction, and operated by a simple switch. Other jobs using this equipment or similar equipment were coded at the level designated by the company for this job.

With respect to Factor 11, surroundings, the umpire found that the mouldmen were exposed to considerable heat, but clearly not to that of D level, "extreme heat of intensive degree and for considerable time" as the union claimed.

Still another case involving reclassification centered over the determination of Factor 2, employment training and experience, and Factor 4, Manual Skill. This case pertained to Stamp Former Operator who was engaged principally in running a press to form letters on prepared steel stock. In addition to operating the press certain grinding operations were added to, or at least developed on, the job. The company agreed to changes in rating for three factors of a total of 1.4 points, but disputed Factor 2 and 4 of the union claims.

Factor 2, in the company view was rated at B Code which was described as requiring three to six months to become proficient at the job. The union contended the level should be C, requiring seven to 12 months to attain proficiency. The umpire decided for the company and made the point that the union based its claim in regard to this factor not on the fact that it takes longer than six months to reach proficiency, but on "the general allegation that the parties have in the past generally used Factor 2 to round out classifications and to arrive at a

sensible end result."[12] The umpire found that he could not accept this argument (in addition he asserted it was not a universal rule): "But it is clearly one thing for the parties to use that sort of approach when they are in agreement on it, and quite another to make it the rationale of an Umpire ruling when they disagree as to the proper coding of the factor."

The rating of Factor 4 in this case, manual skill, depended on the grinding part of the job. The umpire found that this grinding required more manual skill and dexterity than that required for setting up for stamping. He decided that the necessary accuracy required a touch and feel in grinding which were manual not mental skills as the company seemed to claim. The net effect of this decision was to raise the evaluation 0.5 points from 6.2 to 6.7 points and in the opinion of the umpire to place it in Job Class 7.

In a case at Lebanon, industrial truck servicemen asked for a new job description and reclassification of their job. They also offered comparisons with jobs in two other plants.[13] The umpire rejected the comparability of these six jobs and pointed out the additional tasks they entailed. Expediters in a case at Pottstown marshalled a list of additional duties which they claimed had been added to their job and so justified its reclassification. The umpire ran through the list of duties and individually pointed out why he was not convinced that they involved a substantial or material change in the job.[14]

The job of Button Trim Machine Operator and Set-Up at the South San Francisco Plant in 1958 was in dispute as a result of a change in the use of the machines from trimming cold forged bolt heads to extruding, or extruding and trimming, hot forged bolt heads. The umpire observed the operation of these machines and others and noted qualitative changes in the job. The bolts varied more when hot, they jammed easier, the processing required more versatility on the part of the operator; oil in and about the machines had measurably increased. The problem for the umpire after making the above finding

12. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. 357, August 14, 1957, Bethlehem Plant, Ralph T. Seward, Impartial Umpire, p. 3, 4.
13. *Bethlehem Steel Company and United Steelworkers of America,* Lebanon Plant, March 26, 1954, Impartial Umpire Decision No. GAD-4, G. Allen Dash, Jr., Impartial Umpire.
14. *Bethlehem Steel Company and United Steelworkers of American,* Impartial Umpire Decision No. AS-50, February 17, 1959, Pottsdown Plant, Arthur Stark, Impartial Umpire.

was to translate these changes into the ratings and codings of the various factors. This he did by ruling that Factor 2, employment training and experience, Factor 3, mental skill, Factor 5, responsibility for materials, and Factor 12, Hazards, should be increased in rating. Factor 6, responsibility for tools and equipment, and Factor 8, mental effort, were not increased.

In increasing the first three factors listed above, the umpire emphasized that the shift from cold forged bolts to hot forged entails a change in the use of the machines "which substantially alters the job requirements."[15] In increasing Factor 12, hazards, the umpire had to consider the "Likelihood and Nature of Injury" involving: "The probability and severity of injuries to which the workman is exposed, assuming that the workman is exercising reasonable care in observing safety regulations."

He had to decide between the following two descriptions of Code A and Code B:

> "Accident hazard low and usual injuries consists of minor cuts, bruises, and burns. Operate machines, machine tools, material handling equipment or control movement of material when only occasionally exposed to moving machinery. Perform repetitive manual tasks, such as feeding or piling product or material." (A). Accident hazard moderate and probable injuries consist of severe cuts, bruises or fractures such as encountered when performing routine crane hooking, operating tractors and trucks; regularly adjusting moving machinery or product. Exposed to falls such as may occur when walking or climbing over bins, stock buggies and low scaffolds. . . ." (B).[16]

With respect to Factor 6, responsibility for tools and equipment, the essential question to be decided was which of these two descriptions fitted the job:

> "moderate attention and care are required to prevent damage to dies, power driven cutting tools and rolls while processing materials" (C).

15. *Bethlehem Pacific Coast Steel Corporation, South San Francisco Plant and United Steelworkers of America,* AFL-CIO, Local Union No. 1069, Award on Grievance No. 956, October 1, 1958, Hubert Wyckoff, Impartial Umpire, p. 7.
16. *Ibid.,* p. 11.

"close attention and care are required to prevent damage to complex high speed machines and production lines." (D).

The umpire reasoned that "the increase volume of extruding on hot forged bolts has increased the degree of attention and care required to prevent damage to extrusion dies, but not to other tools and equipment. The type of damage, thus being confined to dies rather than to "complex high speed machines and production lines," places this job more aptly under C than D.[17]

The umpire's award increased four factor ratings and denied an increase in two, resulting in a coding of the job at 10.7 points in Job Class 11. Management had coded it at 8.9 in Class 9, and the union proposed a coding of 11.5 in Class 12.

Cases Involving Employee Classification

Three cases illustrate classification grievances. Two laborers at the Bethlehem plant requested pay for doing work which had no job classification, but which they claimed was not laborer's work.[18] Explicitly they also requested to be classified in the job of Chainman which did not exist as such. The company claimed that the job description of several of the laborers' classifications throughout the plant included the type of work which the grievants were performing. The umpire thought that it would be much better if there were a job description for the laborers in the particular department which actually covered the work they were doing. However, he could find no authority for a decision on his part either to establish a new job description or a new job classification to handle the case. This was the mutual responsibility of the parties.

Another case involved the demotion at least in pay of a worker while training for a new job which training he himself had requested. A claim of past practice was made in this case. But the past practice appeared to have taken place before 1948 when the two job in question were set up as multiple rated. Thus, in the transfer for training the worker went from the top grade in Inspection to the middle grade in Spark Testing and sustained a drop in classification of one class. If the company had followed strict contract provisions, as given in Part

17. *Ibid.*, p. 9.
18. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. COG 7, Feb. 10, 1954, Bethlehem Plant, Charles O. Gregory, Impartial Umpire.

V of the Manual for Job Classification, it seems the demotion could have been to the lowest grade. As the umpire remarked, it appeared that they wished to alleviate the seeming inequity to the employee. The umpire then directed that the employee retain his old classification during the training period. He reasoned that the past practice would be admitted even though all the changes occurred after the 1948 rating of the jobs in a multiple basis, because he did not think the contract language was intended to disrupt the practice.

A third case, in which a welder requested adjustment because he was now doing electric as well as arc welding, was dismissed. The arbitrator could find no substantial change under Article V, Section 1, which would justify his considering a reclassification. He also thought that both types of welding were included in the original job description.[19]

Cases Involving Classification of New Jobs

An early case raised a question regarding the type of job description required by the contract. The grievant asserted that the particular new job was described badly. The job was that of Pointer Automatic-Bolt and Nut Department and the complaint was that the job description as drawn up by the company did not indicate among other things either the number of machines to be operated or the size of product to be handled. Comparison of jobs at other plants in the opinion of the umpire failed to support the union's position. He said that the agreement of the parties required more detailed descriptions and quoted a passage from the Manual which follows an example given there of a Job Description:

> The job description which appears above is intended to be sufficient merely to identify the position and should not be interpreted to describe all of the duties, performance of which may be required of employees holding such position.

The Umpire then added his own comments:

It may be true, as the Union contends, that mere identification of a job will not satisfy the Manual and that complete Job Descriptions are in the best interest of all concerned. But the Union contention, as made by this grievance, finds no support

19. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. COG 18, Bethlehem Plant, April 2, 1954, Charles O. Gregory, Impartial Umpire.

either in the Manual or in the form in which Job Descriptions have historically been drafted and approved by the parties.[20]

Two cases decided by the same umpire take up the relevance of comparisons in view of Section 1 of the Manual for Job Classification which states: "In assigning numerical classifications to each factor of a job, consideration must be given to numerical classifications agreed to by the Company and the Union for other jobs." In both cases the umpire interpreted the above quotation from the Manual to mean that he had the obligation of considering these other determinations. However, he also stated that this did not preclude his consideration of the job under dispute. In both cases, he then took up the detailed factors at issue giving consideration to the comparisons proposed as well as to the particular and peculiar aspects of the jobs in dispute. In one case, he agreed entirely with the company determinations; in the other, he increased one Factor and thus raised the job one class.[21]

A new job classification of a Helper in the Cold Mill at Lebanon was contested by the union as to three Factors. The handling of one of them by the umpire illustrates the uses and limits of precedent and comparisons. In classifying Factor 7, responsibility for operations, the union claimed that level "C" was proper on the assertion that the Helper was "Responsible for operating a small or individual unit where continuity of production is required," as the Manual describes it. This assertion was supported by a previous decision, in which the operator of the Cold Mill was so coded, and by comparison with the general classification of similar welding operations in the plant. The umpire disagreed with these contentions, using the words of the cited decision against them, and pointing out that in welding operations where employees work as a crew as in the disputed job the coding was as the company had proposed. The umpire, however, found for the union on the other two factors in dispute, responsibility for safety and physical effort, and raised the job one class.[22]

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20. *United Steelworkers of America, CIO and Bethlehem Pacific Coast Steel Corporation, In Arbitration Proceedings,* South San Francisco Plant March 25, 1954, Grievance 812, Hubert Wyckoff, Impartial Umpire, p. 53.
21. *Buffalo Tank Corporation and Local 3734, United Steelworkers of America,* Impartial Umpire Decisions No. HHP 12 and HHP 13, May 19, 1954, Harry H. Platt, Impartial Umpire.
22. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. 130, Lebanon Plant, April 21, 1955, Ralph T. Seward, Impartial Umpire.

One interesting case illustrated the problem of "breaking out," that is, separation of functions performed by one classification and assignment of these to a new classification. In the union view, it is the establishment of a new and lower paying class to perform functions formally performed by a higher classification. In many respects, the problem resembles the traditional and classical one of specialization in which the functions of a job are broken down into simpler jobs.

This case concerned Bed Planers in the Machine Shop at the Leetsdale Plant who had been classified as Machinist at Job Class 16. The company in a period of increased production wished to establish a "limited purpose" job at a Class of 8. The union contended that the Machinist Classifications covered this work and that the company lacked a contractual right to "break out" this work and establish the new and lower paying job. In the history of the work done by the Bed Planers there was a general decrease in the complexity, difficulty and exactness of the operations. However, the work had always been done by Bed Planers classified as Machinists. It appears that five Machinists were usually assigned to the Bed Planers, two grade "A", two grade "B" and one grade "C". The "A" men did the most difficult work, the "B" men less difficult work and the "C" men routine work. When the company wished to add one man to the Bed Planers in 1953, an employee competent to run the Bed Planer, but not qualified as a Machinist, was available, and thus the company proposed the new limited purpose job.

The umpire held that the issue depended on whether the work in the Bed Planer Operation could be considered a new job according to Article V, Section 1 of the contract. He thought not and could see no distinction between work and responsibility of the new job and that of the old Machinist "C" grade. He said:

> It is true that the Job Classification Manual recognizes the possible existence of "limited purpose jobs related to craft work" and provides for their description and classification. But nothing in this Manual authorizes the unilateral reclassification of duties and responsibilities which have been recognized by both parties for years as being covered by an existing craft job and which have never been changed.[23]

23. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. 179, Leetsdale Plant, January 18, 1956, Ralph T. Seward, Impartial Umpire, p. 6.

While recognizing the company's argument that in the classification scheme envisaged by the Manual, a Machinist-like job, just as other "craft jobs", was to cover jobs in which the worker's potential duties are as important as his actual ones, he argued that the classification had been agreed to by the parties and that the question was not whether the job could be classified in other or better ways.[24]

A new job classification case arose at Steelton as the result of numerous changes over the years in a Tool Dispenser Job. The Company proposed the establishment of a new job of Receiving Checker to cover the changes. The Company classified the job at Class 6; the union claimed that Class 9 was proper and disputed coding on five Factors proposed by the company. The umpire found for the company on three of these factors, employment and training, mental effort, and responsibility for the safety of others. He based these findings largely on codings for comparable jobs. Two factors, responsibility for material and surroundings, were given a higher rating than the company suggested. The ruling on the first factor was based on the care required in handling the type of materials which the job often handled. The last factor was recoded because the suggested code was for work inside an average factory type building, while the Receiving Checker job involved a portion of outside work in helping to unload railroad cars or trucks. The result of these determinations was to place the new job in Class 7, one class above the company's proposal and two below the union's.[25]

Summary and Conclusions

This paper has attempted to survey the record of arbitration of job classification grievances under one agreement between a large corporation and a large union. It has sought to discover the special characteristics and qualities of the arbitration of job classification cases, and to learn the effects of a formalized system of wage administration on the arbitration process. It has tried to uncover the problems which the arbitrator faces, the methods he uses, the qualities he needs, the reasoning he follows.

The Bureau of Labor Statistics study of the first ten years of arbitration under the Bethlehem agreement pointed out that large in-

24. *Ibid.*, pp. 8, 9.
25. *Bethlehem Steel Company and United Steelworkers of America,* Impartial Umpire Decision No. 225, Steelton Plant, July 16, 1956, Ralph T. Seward, Impartial Umpire.

equity cases were eliminated from the grievance procedure with the acceptance of the classification program. It noted that the element of judgment on the part of the arbitrator became less important to the extent that more detailed and precise norms and criteria were given him under the new program. However, this early emphasis on the judgment of the arbitrator can also in part be explained as a feature of the early days of the arbitration process in industrial relations as a whole. In developing arbitration into a systematized process, all early arbitrators had to develop norms and criteria of interpretation.

Nevertheless, it seems true that the limitation of the area of judgment of the arbitrator is a special characteristic of the process under a developed and detailed system of job classification. The arbitrator acts within definite limits and according to specific job descriptions and stipulated coding and rating definitions. The mutual agreement of the parties and their responsibility to mutually determine many details of the system is emphasized. The arbitrator normally does not correct inequities when these arise from the failure of the parties to handle problems according to the procedures of their agreement. He must act within the limits of the system and has less flexibility in rectifying inequities that develop and in making up for shortcomings.

Under a developed and detailed job classification program, the main demands on the arbitrator would seem to be those on his technical knowledge of the job and of the industry as a whole. He needs an understanding of many features about the job in dispute: its operations and its position in the work process; the tools, machines, equipment, and material used; the skills, training, and experience required. He must see the job in relation to other jobs in the plant and in the industry. In addition, the arbitrator needs a basic understanding of the job classification agreement of the parties, if such exists, and of the spirit of that agreement. Where a mutually agreed system does not exist, he must understand the attitude of the union towards the classification system and adjust his deliberations to the intent and stipulations of the parties in submitting cases to arbitration.

The question might be asked: does he need to be an expert in job classification and wage administration. Probably, the best answer is that he does not need to be an expert, but after a few cases he soon becomes one—at least to a limited degree. The impression left by the Bethlehem experience is that a capable, and even excellent, job was done by arbitrators, not all of whom presumably were classification and wage administration experts.

TAXATION OF FOREIGN AWARDS

by Max H. Bresch

When dealing with the enforcement of foreign judgments or arbitral awards, writers, committees of experts and government officials mostly concentrate on the requirements, substantive and procedural, of the law of the country where enforcement is desired (hereinafter called the enforcement country) or by the—bilateral or multilateral—convention to which such country is a party. Those requirements are often rather difficult to satisfy and it is understandable therefore that efforts are directed to ease those requirements. This is why other difficulties in the way of enforcement all too often escape attention, although they are likely to prove an even greater hurdle for the foreign creditor. They are found in the revenue laws of the enforcement countries, in particular, in the laws on Registration Duties (*Droits d'Enregistrement*).

It is unnecessary to give a full account of the history of those duties, or of their present state. Suffice it to say that in Europe those duties can, to a large extent, be traced back to the feudal period when land was the principal source of wealth. The feudal lord let it out to tenants in consideration of military or other services. On any transfer or transmission of the land by one tenant to another, feudal dues ("droits de mutation") were exacted by the lord. When feudalism broke down, the state claimed payment of similar duties for itself. Thus originated the modern duties on the conveyance of land. In the meantime, however, the development of trade and industry, especially in the towns, led to the appreciation and accumulation of movable property (chattels). The State or Town (in many of the medieval Town Republics there was no difference between State and Town) quickly realized that transfers of movables could be made liable to duties just as well as transfers of land, to the great advantage of the Revenue. The difficulty was, however, that whereas a change of ownership of land could not remain unnoticed, transactions in respect of movables might do so. Hence the tendency to

require a written instrument for certain classes of transactions. This was greatly facilitated by the invention of printing. At this point a further development took place. Some countries subjected the said writings to stamp duties varying with the size and length of the paper (or other writing material) used, although for certain transactions the amount of the stamp duty varied with the consideration or value involved in the transaction (ad valorem stamp duties). In other countries, especially in France, writings were also made subject to stamp duties, mostly of moderate amounts. But in addition writings relating to the sale or other transfer of property of any kind were subjected to special duties on registration. Such registration had been usual for centuries in the big commercial towns such as Venice, Florence and Genoa. This was found useful to facilitate evidence and to prevent fraud, especially as to the date of the writing which was to be deemed the date of its registration. In consideration of the service thus rendered by the State or Town, certain registration fees had to be paid by the party requiring the registration. This was the origin of the "droits d'enregistrement." They mostly varied according to the nature and value of the transaction. At first, registration was merely voluntary and the only means of inducing the parties to register was that in the absence of registration, the date of the writing could not be proved.

However, as registration fees increased, parties became less inclined to register documents. At this stage, the legislator intervened and made registration of certain important classes of writings compulsory. A party who failed to register the writing within a certain time limit, set by law, could register it subsequently only on payment of penalties. In addition, even where the writing was of a class which was not required to be registered within a limited time, it could not be made use of in Court or before other public authorities unless and until it had been registered and the requisite duties paid. It was at this point that the development started with which this article is mainly concerned. As long as registration was voluntary, the duty payable in respect thereof was simply the price of a service rendered by the State or Town to the citizen. But when registration was made compulsory, either directly or indirectly by making it impossible to use an unregistered writing in Court or otherwise, registration fees became a form of taxation, and the eternal battle between Revenue and taxpayer extended to this tax as well.

In France, registration duties ("droits d'enregistrement") were enacted or rather re-enacted during the French Revolution by a 1796

law which is still the basis of the existing law, although its provisions and the subsequent amendment thereof are now consolidated in Art. 634-837 of the Code Général des Impôts.

Papers not required to be registered within a certain time limit must, however, be registered before any use may be made thereof in Court or before other public authorities or even before a Notary. This applies also to documents drawn up abroad. Art. 809 Code Général des Impôts forbids any notary public, hussier (a bailiff), greffier (principal Court Clerk or Registrar), Avoué (whose right and duty it is to assist litigants in Court proceedings or rather at certain stages thereof), and any other public officer to perform or draw up anything by virtue and in consequence of a writing required to be registered within a certain time limit, or to annex it to a record of his own, or to accept it in deposit for safe custody or to deliver a certified copy, abstract or engrossment thereof unless and until it is registered and the competent duty paid, even if the time limited for registration has not yet elapsed. Art. 813 of the Code provides that whenever an Order is made against a Defendant on a registered act, the judgment or arbitral award is to state the amount of the fee paid thereon, the date of such payment and the office to which it has been made. If this is omitted and if the act must be registered within a certain time limit, the official concerned is to require payment of the fee where it was not paid to his office, subject, however, to repayment where it is shown subsequently that the fee was actually paid to another office. This provision reproduces Art. 44 of the laws of the 22 Frimaire an VII referred to above.

The above mentioned provisions of Art. 809 and 813 show the very serious obstacles thereby created to the enforcement of a foreign judgment or award. In fact in most cases such a judgment or award is based on a foreign writing or transaction which would not normally be required to be registered in France at all. When, however, its enforcement is demanded in France, this involves, of course, a use thereof in a French Court and therefore the foreign judgment or award itself, as also any writing or transaction on which it is based, becomes liable to French registration fees. This is all the more serious as those fees are payable on the sums expressed in the judgment, award, writing or transaction even if enforcement is demanded for the recovery of a lesser sum (e.g. in the case that the judgment creditor has already recovered part of that sum or that the foreign writing or transaction involves a sum greatly in excess of the damages actually

awarded to him). In very many cases the registration fees thus payable by the judgment creditor, are so high that they will, of necessity, stop the creditor from enforcing his judgment or award and allow the debtor to go scot free.

What is true of France is also true of many countries which follow French and Spanish legal traditions. As often happens, the disciples excelled the master. It is quite impossible to review all relevant laws. It may be sufficient, however, to give an account of Italian legislation. Italy has enacted a special law on registration fees, called Imposta di Registro, thereby avoiding the many complications caused in France by the fact that many heterogeneous acts or facts, such as death duties and gifts, are treated as registration fees. On the other hand the difficulties of enforcing a foreign judgment or award have been greatly increased. The present Italian law on the Imposta di Registie is the Royal Decree of December 30, 1923, No. 3269.

There have been some amendments in 1936, 1942 and 1947, approving a new text of the law, but they are not relevant to this article. In many respects the Italian law is rather similar to French law in that it maintains the distinction between writings or transactions required to be registered within a certain time limit and those required to be registered only in case of use being made thereof in the Courts or before other public authorities or officials. The cases where such use is deemed to be made have, however, been increased and, above all, the duties and prohibitions imposed on judges, judicial and other public officials and even on the lawyers of the parties have been pushed to such lengths that it has been truly said that the Italian judiciary is no longer able to administer justice but is compelled to act as tax collector. In fact Art. 118 of the said law forbids:

1. Public officials and civil servants generally to insert in their files or to accept in deposit writings required to be registered but not so registered or to make any order on the strength thereof.

2. Judges (ordinary or special) in civil matters and arbitrators to give judgment to issue decrees or orders on the strength of documents that must be registered but not so registered.

3. The lawyers of the parties to recite, in full or partially in summonses, pleadings or applications, in support of actions or demands whatsoever, the contents of papers required to be registered and not so registered, or to produce those writings to judges or arbitrators either in original or in copy.

Offenders against the said prohibitions are made personally lia-

ble for the registration fees and the relative penalties due on the writing or on a contract by parol. Art. 123, taken bodily from the French law Art. 813 Code Général des Impôts, provides that any judgment or award recovered by a plaintiff on the strength of a registered act must recite the date of its registration, failing which the Registration Office is to recover the registration fee, subject to repayment if payment of the fees is shown within three years to have been made. In this connection Art. 72 of the law may be mentioned. It provides that if judgment is given on the strength of parol contracts then on top of the duty in the judgment itself, such fee is to be charged as would have been payable on the contract according to its nature, had it been registered previously.

Enough has been said to show the serious impact of this part of fiscal laws on the proper administration of justice and in particular on the enforcement of foreign judgments and arbitral awards. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958, provides, in Article III: "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Actually, however, it will not achieve that result at all. It merely prevents discrimination by providing that there shall not be imposed on the recognition or enforcement of awards to which the Convention applies, conditions or charges more onerous than those applicable to domestic awards. This is of no help because the conditions and charges imposed on the recognition and enforcement of domestic awards are just as burdensome as those applicable to Convention awards, and this will in many cases act as a deterrent. To avoid that result, it will be necessary to exempt the recognition and enforcement of Convention Awards from any ad valorem duties and subject it only to a small fixed charge appropriate to the service rendered. This seems all the more justified as charges will often have been imposed already on the Convention Award in the country of its origin. The imposition of further substantial charges in the enforcement country will therefore result in double taxation.

Another and perhaps better suggestion may be to do away, within the limits stated below, with droits d'enregistrement or similar charges altogether and to absorb them instead into the turnover taxes which are easier to assess and collect than the droits d'enregistrement.

DOES THE ARBITRATOR'S FUNCTION SURVIVE HIS AWARD?

by Benjamin Busch

The principle of law that arbitrators are *functus officio* and cannot act after they have made an award, is generally accepted by the Bar. However, under certain conditions, the original arbitrators may, by order of the court, continue to function even after the award.

The first proposition of law is illustrated by the recent case of *Matter of Rednick* (8 A.D. 2d [1st Dept.] 794), which involved an appeal from an order of Special Term which remanded to the arbitrators the issue as to an award theretofore made by them and which directed that the award be increased by $1,000. Holding that Special Term had no power to remand the issues to the original arbitrators, the Appellate Division vacated the awards and ordered arbitration *de novo* before the American Arbitration Association, stating:

> "Once the arbitrators made their award they became *functus officio* and 'without any power to alter or modify or do any other act under the submission.' (*Herbst* v. *Hagenaers,* 137 N.Y. 290, 294; 3 Am. Jur., Arbitration & Award, § 93.) The Civil Practice Act (§ 1462-a, subd. 1) gives the court the power to modify or correct an award where there has been an 'evident miscalculation of figures.' Quite obviously that was not the situation here, for the arbitrators were not even presented with any evidence as to the $1,000 item. Neither party has contended that the original award be confirmed. Hence, it seems appropriate that the 'entire controversy should be remanded for a new arbitration.' "

It would appear from the above that the decision of the court to remand for a *new* arbitration was actually an exercise of discretion, and not a determination that there is no power of the court to remand the matter to the original arbitrators. The power of the court to do either, where an award is vacated, is contained in the provisions of Sec. 1462 C.P.A., which reads: "Where an award is vacated, the court, in its discretion, may direct a rehearing either before the

same arbitrators or before new arbitrators to be chosen in the manner provided in the submission or contract * * *."

Instances exist where, after vacatur of an award, arbitration has been directed to proceed before the same arbitrators who made the original award (see *Matter of Heymanson,* 276 App. Div. [1st Dept.] 837; *Matter of Lafayette Worsted,* 281 App. Div. [1st Dept.] 259), particularly where there is a need to have the award clarified (see *Matter of Ritchie Bldg. Co.* [*Rosenthal*], 9 A.D. 2d [1st Dept.] 880; *Application of Zephyr Construction Co.,* 7 A.D. 2d 915; *French Textiles Co.* [*Senor*], 7 A.D. 2d [1st Dept.] 896; *Lublin Construction Co.* [*Fried*], 6 A.D. 2d 987). In some cases no rehearings have been required (*Trophy Handbags, Inc.* v. *Craft Industrial Case Corp.,* 156 N.Y.S. 2d 45, affd. 3 A.D. 2d 733; *Matter of Farmella* [*Meer Corp.*], *McGivern, J.,* N.Y.L.J. 7/10/1958, p. 2; in others, additional evidence has been permitted (see *Matter of Livingston* [*Banff, Limited*], 13 Misc. 2d 766; *Matter of First Nat. Oil Corp.* [*Arrieta*], 2 Misc. 2d 225, affd. 2 A.D. 2d 590; rearg. & app. den. 3 A.D. 2d 672, appeal dismissed 2 N.Y. 2d 992).

Another aspect of the problem was illustrated in *Matter of Koppell* [*Davis*], 8 A.D. 2d [1st Dept.] 612. In that case there was submitted to the arbitrators, among other issues, the question whether a unilateral dissolution of a partnership was in accordance with a written agreement. The arbitrators determined that it was and directed the partners to account to each other and set forth a general formula for the method of striking a balance and the making of final payments. In confirming the award, Special Term appointed a Referee to take and state the account of the ex-partners.

One of the partners appealed to the Appellate Division, claiming that as the partnership agreement provided for the settlement by arbitration before the American Arbitration Association of "Any controversy or claim arising out of or relating to (said) contract," the appointment of a referee was in contravention of the agreement between the parties and was, therefore, improper. The corollary to this contention was that an accounting issue was within the meaning of the arbitration clause and was, therefore, to be determined *solely by arbitration,* as the parties intended by the agreement entered into between them (*Matter of Marchant* v. *Mead Morrison Mfg. Co.,* 252 N.Y. 284, 298; *River Brand Rice Mills, Inc.* v. *Latrobe Brewing Co.,* 305 N.Y. 36, 40-41).

The respondent on the appeal argued that the appointment of a

referee was proper where necessary for the enforcement of the arbitration judgment, relying on *Matter of Hunter* [*Proser*], 274 App. Div. [1st Dept.] 311, affd. 298 N.Y. 828.

Modifying the order appealed from, by striking out the appointment of the referee, the court stated: *"Any dispute incident to compliance with the award may be properly the subject of further arbitration,* but that question is not yet reached. Under the circumstances, the appointment of a referee to take and state the account is unnecessary." (*Matter of Hunter* [*Proser*], *supra.*) (Emphasis supplied.)

Thereafter the appellant sought arbitration, claiming that a "dispute incident to compliance with the award" had arisen in respect to the accounting directed by the original arbitrators. Special Term enjoined the arbitration on the ground that the alleged dispute was not genuine. An appeal was again taken to the Appellate Division, where it was argued that the propriety of further arbitration with respect to the dispute under the award was founded upon the well-settled legal precedent that where there is a broad provision for arbitration, "all issues arising subsequent to the making of the contract" must be submitted to arbitration (*Matter of Terminal Auxiliar Maritima* [*Winkler*], 6 N.Y. 2d 294).

The Appellate Division vacated the stay, reversed the order appealed from and directed arbitration to proceed before the same arbitrators as made the original award, stating (*Matter of Koppell* [*Davis*], 10 A.D. 2d 571, 572):

> "On a prior appeal in this matter (*Matter of Koppell* [*Davis*], 8 A.D. 2d, 612) we wrote as follows: 'Any dispute incident to compliance with the award may be properly the subject of further arbitration, but that question is not yet reached.' We have now reached the question. There is a dispute incident to compliance with the award. This dispute stems from the original controversy — one which the parties agreed to arbitrate. It should, therefore, be decided by arbitration. If the dispute were one which had its genesis only in the award, the result might be different. Inasmuch as the parties agreed that in the event further arbitration should be decreed the matter be referred to the same arbitrators who made the award, it is so ordered."

The foregoing is intended to illustrate that arbitrators may be required to continue to act in a controversy even after they have made their award therein.

On *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

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Judicial Confirmation of an Award of Specific Performance of a Personal Service Contract [*Staklinski v. Pyramid Elec. Co.*, 6 N.Y. 2d 159], 48 Calif. L. Rev. 140-144 (1961).

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Specific Performance of Construction Contract [*Grayson-Robinson Stores v. Iris Const. Corp.*, 8 N.Y. 2d 133], 25 Albany L. Rev. 140-143 (1961); 6 Villanova L. Rev. 255-257 (1961); 61 Columbia L. Rev. 296-300 (1961).

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Union Arbitration, the Civil Practice Act and the Remedy of the Individual, 35 St. John's L. Rev. 85-96 (1960).

AN EDITORIAL

(*Continued from Page* 2)

it as no more than a minor indiscretion. The arbitrator accepts this background as his frame of reference; he does not try to impose his own views of an ideal relationship between offenses and punishment. He modifies penalties only to the extent necessary to bring them into line with the practice of the parties. In short, the test is not whether the punishment imposed was ideal, but whether the company's action was so out of line as to be "arbitrary" or "discriminatory."

The arbitrator's reliance on past practice, as we have indicated, provides parties with a basis for predicting the outcome of pending grievances. In a particular case, it can not be known whether the union or the company will win, for many factors, including the demeanor of witnesses and the effectiveness of the parties' case presentation, are involved. But it is a certainty that the decision will be consistent with the practices of the parties and it will be within the general framework of collective bargaining agreement interpretation. One may not be able to predict whether a discharged worker will be reinstated and, if so, whether he will be awarded back pay. But the parties can be certain that no experienced arbitrator would direct an alternative punishment, let us say, of six months' forfeiture of overtime opportunities, unless it could be shown that the parties had regarded this unusual measure as a suitable form of discipline.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

SUBCONTRACTOR CANNOT BE BOUND BY THE ARBITRATION CLAUSE BETWEEN A PRIME CONTRACTOR AND A THIRD PARTY DESPITE THE FACT THAT THE SUBCONTRACTOR'S CONTRACT BINDS HIM TO ARBITRATE WITH THE PRIME CONTRACTOR. *Arthur Pile & Foundation Corp. v. Bonjay Housing Corp.,* 208 N.Y.S.2d 823 (Sup. Ct. 1960).

FEDERAL COURT MAY COMPEL ARBITRATION EVEN WHEN FEDERAL ARBITRATION ACT IS NOT APPLICABLE. A 1953 Treaty between the United States and Germany for the validation of German dollar bonds in the United States provided for an arbitration procedure when the validation board refused to validate the securities. The arbitration provision is not covered by the Federal Arbitration Act which applies only to written contracts of parties to arbitration and the only "contract" involved here was the Treaty between the two governments. As the Treaty, as part of the "Supreme Law of the Land," binds the court, the court deriving its authority to direct arbitration from the executive and legislative fiat embodied in the Treaty, granted a motion of a Venezuelan corporation as alleged owner of German dollar bonds to compel arbitration after refusal of the Validation Board to validate such bonds. *Cavas Compania Anonima Venezolana de Administrazion y Comercio v. Board for the Validation of German Bonds in the United States,* 189 F. Supp. 205 (S.D. N.Y., Herlands, D.J.)

THE FACT THAT AN INDIVIDUAL PARTNER SIGNED AN ARBITRATION AGREEMENT IN A COLLECTIVE BARGAINING AGREEMENT WAS SUFFICIENT TO BIND THE NON-SIGNING PARTNER PERSONALLY AND INDIVIDUALLY TO THE AGREEMENT TO ARBITRATE. *Camhi v. Local 62, ILGWU,* 208 N.Y.S.2d 162 (Sup. Ct. 1960).

WHETHER A CONTRACT CONTAINING AN ARBITRATION CLAUSE IS VOID FOR LACK OF MUTUALITY IS AN ISSUE FOR THE COURTS TO DECIDE. If arbitrators would be allowed to determine mutuality, they would, in effect, "be determining the nonexistence of a valid and enforcible agreement between the parties. However, this is not permissible, for the arbitration clause and the right to proceed under it are necessarily grounded upon the existence of a valid agreement. If the agreement is nonexistent, the arbitration clause therein contained, *not standing apart* as an independent agreement, is perforce ineffective." (Emphasis supplied.) *Loewy v. Rosenthal-Porzellan,* 25 Misc.2d 132 (Sup. Ct. 1960).

WHETHER ARBITRATION AGREEMENT EXISTS IS MATTER FOR THE COURT TO DETERMINE. On a proceeding to compel arbitration the court must first determine whether there is in existence a valid agreement to arbitrate. Such determination must be made by trial and not by affidavits alone. *Nadal Baxendale, Inc. v. Iannace,* 12 App. Div. 2d 785, 209 N.Y.S.2d 615 (Second Dep't. 1961).

LANDLORD AND TENANT DIRECTED TO ARBITRATE DISPUTES OVER PAYMENT OF TAXES UNDER A WRITTEN LEASE. "There is no dispute that the parties entered an agreement which provides for arbitration of 'any disagreement, difference, dispute or controversy arising under this lease . . . and the court cannot hold that the meaning of a clause as to . . . the first fully assessed taxes shown for school and town taxes when premises were first fully assessed . . . is beyond dispute." *Consolidated Avionics Corp. v. Sem Co.,* N.Y.L.J., June 3, 1960, p. 16 col. 7; aff'd 12 App. Div. 2d 642 (Second Dep't. 1960).

COURT PROCEEDINGS WILL NOT BE STAYED PENDING ARBITRATION UNLESS THERE IS A CONTRACTUAL REQUIREMENT THAT DISPUTES BE SUBMITTED TO ARBITRATION. Where a contract between an investor and a brokerage partnership to advise on investments did not contain an arbitration clause and where the investor later opened a brokerage account with the same partnership, which agreement did contain an arbitration clause but did not refer to the first contract, disputes arising under the first contract were not subject to arbitration. *Kramer v. Dreyfus & Co.,* 25 Misc.2d 594, 207 N.Y.S.2d 29 (Sup. Ct. 1960).

II. THE ARBITRABLE ISSUE

COURT MAY NOT GRANT SUMMARY JUDGMENT OF CLAIM WHICH CONTAINS MATTERS FOR AN ARBITRATOR TO DETERMINE. Where the contract contained an arbitration clause and there was sharp dispute concerning delivery of the goods claimed, this was an arbitrable issue under the contract and the granting of summary judgment by the lower court was error. *Meinhard & Co. v. Allegro Knitting Mills, Inc.,* 208 N.Y.S.2d 251 (First Dept. 1960).

WHETHER A PARTICULAR VEHICLE IS UNINSURED IS NOT AN ARBITRABLE ISSUE UNDER UNINSURED MOTORIST CLAUSE OF INSURANCE POLICY. An insurance policy providing that the insured could recover from his own carrier, when involved in an accident with an "uninsured automobile," all sums which he would be legally entitled to recover, and if the parties could not agree as to the amount thereof it would be settled by arbitration, was not broad enough to include arbitration of whether the automobile involved in the accident with the assured's vehicle was uninsured or not. *Allstate Ins. Co. v. Smith,* 207 N.Y.S.2d 645 (Sup. Ct. 1960).

FUTURE OPTION RIGHTS HELD NOT ARBITRABLE UNDER A BROAD ARBITRATION CLAUSE. Producers claimed that authors gave broadcasting company an option to obtain rights in a future play and then failed to give such right, thus breaching an obligation implied in law. Said alleged breach of obligation does not come within the ambit of the agreement between the producer and author for production of a musical play providing that any dispute in connection with contract or breach thereof should be submitted to arbitration. *Levin v. Columbia Broadcasting System, Inc.,* 25 Misc.2d 208, 208 N.Y.S.2d 825 (Sup. Ct. 1960).

WHETHER INTEREST WAS TO BE PAYABLE IS ARBITRABLE ISSUE WHERE THE CONTRACT WAS SILENT ON THIS ISSUE. Where a contract contains a broad arbitration clause, e.g. "any differences which may arise between the parties to this agreement," all issues arising out of the agreement are arbitrable, except those which do not present bona fide disputes. *Pollak v. Breslow,* 25 Misc.2d 1047, 206 N.Y.S.2d 914 (Sup. Ct. 1960).

SENIORITY STATUS OF FOREMEN RETURNING TO BARGAINING UNIT HELD ARBITRABLE. Employees after having been promoted for a time to supervisory status were subsequently demoted and returned to the collective bargaining unit without prior negotiation as to their status. The contract provided that such employees "may be returned" to the bargaining unit with the same seniority as when they were transferred out. The union interpreted this to mean that negotiation was implied as to the return of such employees. The District Court, W.D., Pa., held this was an arbitrable issue and the Court of Appeals affirmed. *Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 188 F. Supp. 225, aff'd 283 F.2d 93 (3rd Cir. 1960).

WHETHER STORED GOODS WERE IMPROPERLY AUCTIONED IS ARBITRABLE UNDER A STORAGE WAREHOUSE AGREEMENT. The issue of whether a bailor had tendered payment of storage charges prior to an auction of her furniture by the bailee was to be decided by the arbitrator under a clause which read: "Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claim be founded in tort or contract, shall be settled by arbitration. . . ." *Muller Brothers v. Norma Brill,* 208 N.Y.S.2d 791 (Sup. Ct. 1960).

FEDERAL DISTRICT COURT HAS JURISDICTION TO ENTERTAIN DECLARATORY JUDGMENT ACTION BROUGHT BY EMPLOYER TO DETERMINE WHETHER DECISION OF ARBITRATOR ON PARTICULAR GRIEVANCE WOULD BE NULL AND VOID. Under section 301 of the Labor Management Relations Act, providing for federal jurisdiction of suits for violation of labor management contracts in industry affecting commerce, the court may so decide. "The court is thus not called upon at this time to deal with the ultimate question of whether the grievance presented is arbitrable or with the further preliminary question of whether the court or the arbitrator is to determine its arbitrability." *Weyerhaeuser Co. v. Int'l Bro. of Pulp, Sulphite and Paper Mill Workers,* 190 F. Supp. 196 (D. Maine, S.D. 1960).

WHETHER EMPLOYER HAD ACTUALLY CEASED DOING BUSINESS IN THE STATE OR WAS CONTINUING TO OPERATE THROUGH AUTHORIZED AGENTS HELD AN ARBITRABLE ISSUE, under collective bargaining agreement which gave him the right to remove his business from New York State. *Glaessgen (as Pres., Local 459, IUE, AFL-CIO) v. R. C. Allen Business Machines, Inc.,* 209 N.Y.S.2d 867 (Sup. Ct. 1960).

WHERE EMPLOYEE TERMINATED EMPLOYMENT CONTRACT RELEASING AND DISCHARGING HIS EMPLOYER FROM ALL CLAIMS, no arbitrable issue existed regarding the fairness of such agreement since this release was unambiguous and presented "no question as to the contract to which it referred or the subject matter thereof. . . ." *Pfitzner v. McCabe,* 208 N.Y.S.2d 103 (Sup. Ct. 1960).

WHETHER EMPLOYEE WAS ENTITLED TO BE PAID FOR "FLOATING" HOLIDAY WHICH MIGHT OCCUR AFTER TERMINATION OF THE AGREEMENT IS A MATTER FOR THE ARBITRATOR TO DECIDE, under collective bargaining agreement calling for arbitration as the sole method of settling any dispute "concerning the interpretation or application of any provision of this agreement." *George Rattray & Co. v. Trenz,* 209 N.Y.S.2d 869 (Sup. Ct. 1960).

FRAUD IN THE INDUCEMENT IS ARBITRABLE UNDER STANDARD AMERICAN ARBITRATION ASSOCIATION CLAUSE. In a maritime dispute where a court order directing arbitration was affirmed, a party alleging fraud was not able to assert sufficient facts to warrant a trial of the issue. However, the court observed: "Had the parties used the standard clause recommended by the American Arbitration Association and widely used, the arbitration agreement would clearly have been sufficiently broad to cover a dispute over fraudulent inducement, and that issue would have been one of the issues to be decided by the arbitrators. . . . This standard clause reads: 'Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration.'" *Kinoshita & Co., Ltd. v. American Oceanic Corp.,* Docket No. 26608, March 16, 1961 (2d Cir., Medina, C.J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

UNION MEMBERS ACTION IN VIOLATION OF THE COLLECTIVE BARGAINING AGREEMENT DOES NOT RELIEVE THE EMPLOYER FROM THE OBLIGATION OF ARBITRATING THE PROPRIETY OF THE DISCHARGES OF SAID EMPLOYEES. The collective bargaining agreement, calling for arbitration of disputes, contained a no-strike provision during the life of the agreement. The company alleged that the employees violated the no-strike provision and therefore the discharge was proper. The court said: ". . . this case is one precisely suited to the arbitration process under the agreement that the parties have made." *Int'l Molders & Foundry Workers Union of North America v. Susquehanna Casting Co.*, 283 F.2d 80 (3rd Cir. 1960).

COURT DETERMINES PRELIMINARY LEGAL QUESTIONS SUCH AS COMPLIANCE WITH TIME LIMITS WITHIN WHICH TO FILE CLAIM BEFORE ARBITRATION MAY BE HAD UNDER NEW YORK UNINSURED MOTORIST LAW. Although notice must be given the MVAIC "within ninety days or as soon as practicable" after the occurrence of an accident, the injured party is not obliged to give notice until he knows as a matter of fact that the car involved in the accident was uninsured. *Stroud v. Motor Vehicle Accident Indemnification Corp.*, 209 N.Y.S.2d 221 (Sup. Ct. 1961).

ARBITRATION OF UNINSURED MOTORIST DISPUTE CANNOT BE STAYED PENDING DETERMINATION OF ARBITRABILITY BY DECLARATORY JUDGMENT. Under the New York Automobile Accident Indemnification Endorsement "the matters in controversy are to be determined by arbitration, and there is no justification for a stay of the arbitration proceeding pending determination of the alleged declaratory judgment action." *Motor Vehicle Accident Indemnification Corp. v. Kirby*, 208 N.Y.S.2d 1010 (1st Dep't. 1961).

DETERMINATION OF UNINSURED STATUS OF MOTOR VEHICLE MUST BE MADE INDEPENDENT OF AND PRIOR TO INVOCATION OF THE ARBITRATION CLAUSE CONTAINED IN THE INSURANCE POLICY. The court held that the insured claimant's seeking such determination together with an order to compel arbitration was unauthorized under sec. 1450 C.P.A. *Rosenbaum v. American Surety Co.*, 12 App. Div. 2d 886, 209 N.Y.S.2d 994 (Fourth Dep't. 1961).

LABOR ARBITRATION AGREEMENTS ARE ENFORCEABLE UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IN STATE AS WELL AS FEDERAL COURTS EVEN IN JURISDICTIONS WHICH DO NOT HAVE LEGISLATION MAKING AGREEMENTS TO SUBMIT FUTURE DISPUTES TO ARBITRATION ENFORCEABLE. *Volunteer Electric Co. v. Gann*, 41 CCH Lab. Cas. 16,537 (Tenn. 1960); *Local 774 v. Cessna Aircraft Co.*, 186 Kan. 569, 352 P.2d 420 (Kan. 1960).

EMPLOYER NOT COMPELLED TO PRESERVE SENIORITY STATUS FOR ITS EMPLOYEES, WHICH RIGHTS WERE ACQUIRED UNDER AN EXPIRED AGREEMENT CONCERNING A CLOSED PLANT. Individual employees brought suit against their former employer for loss of seniority rights under an expired collective bargaining agreement. A previous arbitration which was initiated by the union was stayed because the issues did not arise from the bargaining agreement. Since the previous determination that the union's claims were not arbitrable were not identical with the issues which the individual employees were now presenting, the court held there was no bar to this suit as the doctrine of res adjudicata does not apply to issues which were not urged by the plaintiffs in the prior arbitration. *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 185 F. Supp. 441 (S.D.N.Y. 1960).

VIOLATION OF THE NO-STRIKE CLAUSE DESTROYS THE UNION'S RIGHT TO COMPEL ARBITRATION. "Without question, the obligation of the plaintiff and its members to continue work was required as one of the steps in the grievance procedure. . . . The plaintiff cannot ignore the portion of the grievance procedure under which it is obligated and at the same time require performance by defendant of another requirement of the same procedure." *Portland Web Pressmen's Union v. Oregonian Publishing Co.*, 188 F. Supp. 859 (D. Ore. 1960).

ARBITRATION NOT COMPELLED WHERE TERMS OF COLLECTIVE BARGAINING AGREEMENT WERE NOT COMPLIED WITH. The collective bargaining agreement specified that new understandings "shall not be the basis of any arbitration proceeding, unless such understanding is in writing and signed by the Company and the Local." The court held that an alleged local understanding which was signed by the Company but not by the Local was therefore not arbitrable and the argument that the signing in behalf of the company should be given the same meaning as the words "signed by the party to be charged" was untenable. *Local 201, Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. General Electric Co.*, 283 F.2d 147 (1st Cir. 1960).

FEDERAL COURT LACKS JURISDICTION TO COMPEL ARBITRATION BY INDIVIDUAL EMPLOYEE OF DISPUTE OVER INDIVIDUAL EMPLOYMENT CONTRACT. Employer laundry brought proceeding in arbitration alleging violation by employee of restrictive covenant not to compete within one year after termination of his employment. The federal District Court held that whether this dispute was arbitrable did not involve a construction of federal labor law but only rights which were uniquely personal to the employee. The real dispute was not any construction under the collective bargaining agreement which would have given the court jurisdiction but only one between employee and his employer over the breach of the individual employment contract. *Consolidated Laundries Corp. v. Craft (Amal. Laundry Workers Joint Board, ACWA)*, 185 F. Supp. 631 (S.D. N.Y. 1960).

INDIVIDUAL EMPLOYEES NOT PERMITTED TO SUE UNION FOR MONEY DAMAGES for deprivation of seniority rights where "it was not shown that the general membership participated in the breach of contract or the tort upon which the plaintiffs predicated their right to relief." Here the arbitration clause would bar such relief, as this is the exclusive remedy under the collective bargaining agreement. If the union is neglectful of the individual employee interests then the individual may demand arbitration. All internal remedies such as arbitration must be exhausted before resort to the courts may be had. *Saint v. Pope* (*Pres., Inspection Unit, Local 516, U.A.W.-C.I.O.-A.F.L.*), 12 App. Div.2d 168 (Fourth Dep't. 1961).

UNION MAY BRING ACTION IN FEDERAL COURT TO RECOVER WAGES DUE TO INDIVIDUAL EMPLOYEES UNDER AN ARBITRATION AWARD. The Court had previously reversed a District Court ruling upholding an arbitration award (digested in Arb. J. 1960 p. 159). Now on reargument based upon the decision of the United States Supreme Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 598, the court affirmed the opinion of the district court. *Mississippi Valley Electric Co. v. Local 130, Int'l Bro. of Electrical Workers, AFL-CIO*, 285 F.2d 229 (5th Cir. 1960).

COURT PROCEEDING WILL NOT BE STAYED PENDING ARBITRATION WHERE THE PLAINTIFF SOUGHT REFORMATION OF THE CONTRACT AND THE ARBITRATION CLAUSE PROVIDED "the arbitrator or arbitrators may not vary or modify any of the foregoing provisions." *Royaloy, Inc. v. General Moving & Storage, Inc.*, 25 Misc.2d 255, 207 N.Y.S.2d 569 (Sup. Ct. 1959).

DEFENSE OF LAWSUIT ON THE MERITS AMOUNTS TO A WAIVER OF THE RIGHT TO ARBITRATE. "As the petitioner did not demand arbitration prior to the commencement of the trial and took affirmative steps in defending the action on the merits, it is now too late to demand arbitration." *Bel-Rose Fashions, Inc. v. Braunheim*, 207 N.Y.S.2d 567 (Sup. Ct. 1957).

A CLAUSE PROVIDING FOR ARBITRATION IN NEW YORK AND FOR NOTICE BY REGISTERED MAIL IS SUFFICIENT TO AMOUNT TO CONSENT TO THE COURT'S IN PERSONAM JURISDICTION UNDER NEW YORK LAW. *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*, 284 F.2d 419 (2d Cir. 1960).

PRIVATE INSURANCE CARRIER NOT COMPELLED TO ARBITRATE UNINSURED MOTORIST CLAIM UNTIL SHOWING OF PREJUDICE WAS ESTABLISHED BY TRIAL. The Supreme Court, Westchester County, held that where the insurer investigated the claim and failed to notify the insured that it was denying liability, or that the claim should properly have been made against the Motor Vehicle Accident Indemnification Corporation, until after the prescribed time limit within which the insured could have presented his claim against the other Corporation, that it assumed coverage

of the claim. *Matter of Gallagher,* 25 Misc.2d 777, 207 N.Y.S.2d 555 (Sup. Ct. 1960). The Appellate Division reversed, holding that "The questions of fact with respect to the enforceability of the contract for arbitration and with respect to its breach may be decided only after a trial." *Gallagher v. Government Employees Insurance Co.,* N.Y.L.J. Feb. 28, 1961, p. 16 col. 5 (2d Dep't.).

CLAIM UNDER A.I.A. CONTRACT MUST BE MADE WITHIN STATUTORY TIME LIMITS BEFORE ARBITRATION MAY BE HAD. The holding of the Court of Appeals, 7 N.Y.2d 476 (digested in *Arb. J.* 1960, p. 101), that a claim has to be presented to the Board of Education within three months after the accrual of the claim, makes it mandatory upon the party seeking to compel arbitration to allege compliance with such time requirement. *Board of Education v. Heckler Electric Co.,* 204 N.Y.S.2d 396 (Sup. Ct. 1960).

IV. THE ARBITRATOR

COURT MAY NOT INSTRUCT AN ARBITRATOR HOW TO COMPUTE DAMAGES. The court said it was not surprising that this is the rule, for if it were otherwise, "it would result in a serious curtailment of the arbitrators' function, a function which, once arbitration is chosen by the parties, should not be encroached upon by the courts." *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama,* 284 F.2d 419 (2d Cir. 1960).

ARBITRATOR DOES NOT HAVE AUTHORITY TO RENEGOTIATE THE COLLECTIVE BARGAINING AGREEMENT. Two corporate employers sought an order directing arbitration against the union under collective bargaining agreements which contained arbitration clauses. The Supreme Court granted the motion and the Appellate Division reversed, holding that the fact that one of the employers owned more than 90% of the stock of the other employer would not serve to unite or so relate the respective collective bargaining agreements as to permit arbitration of the issue of integration of seniority lists of both employers. *Burns Bros. v. James F. McGuire (as Pres., Coal, Gasoline, Fuel Oil Teamsters, etc.),* 11 App. Div.2d 1000, 205 N.Y.S.2d 671 (First Dep't. 1960).

WHETHER PERMANENT TERMINATION OF EMPLOYMENT BY CLOSING OF PLANT AMOUNTED TO A "LAY-OFF" WAS A MATTER FOR THE ARBITRATORS TO DECIDE. The Appellate Division reversed a ruling of the Supreme Court, saying: "Special Term should not have undertaken to decide whether the permanent termination of employment on the closing of the plant was a 'lay-off' within the meaning of the contract. That is for the arbitrators to decide." Further, "The duty to arbitrate a dispute arising during the term of the agreement survives the expiration thereof." *Int'l Assoc. of Machinists, AFL-CIO, Lodge 2116 v. Buffalo Eclipse Corp.,* 12 App. Div. 2d 875, 210 N.Y.S.2d 214 (Fourth Dep't. 1961).

WHETHER ARBITRATION AWARD IS RENDERED WITHIN TIME LIMITS PROVIDED BY THE CONTRACT IS FOR THE ARBITRATOR TO DECIDE. When a decision is necessary to determine whether a procedural time limit contained in the arbitration agreement is merely directory, or renders null and void, per se, a ruling on a matter more than thirty days after final submission, it "would be made by the arbitrator, not the courts, since it involves an interpretation of the agreement." *Local Union No. 971, United Automobile Workers, AFL-CIO v. Bendix-Westinghouse Automotive Air Brake Co.*, 188 F. Supp. 842 (N.D. Ohio, E.D. 1960).

AN ATTORNEY WOULD BE DISQUALIFIED FROM SERVING AS HIS CLIENT'S ARBITRATOR, "just as his client would be." *Karpinecz v. Marshall*, 209 N.Y.S.2d 944 (Sup. Ct. 1960).

BROAD ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT IS SUFFICIENT TO AUTHORIZE ARBITRATOR TO ASSESS DAMAGES AS WELL AS DETERMINE WHETHER THE AGREEMENT WAS VIOLATED, notwithstanding the statutory immunity of unincorporated associations from liability except on proof which would make all members liable individually, found in Sec. 876-a C.P.A. *Publishers' Ass'n of New York City v. New York Stereotypers' Union No. 1*, 8 N.Y.2d 414, 208 N.Y.S.2d 981.

SELECTING AN ARBITRATOR AND PARTICIPATING IN THE HEARINGS ESTOPS A PARTY, UPON RECEIVING AN ADVERSE AWARD, FROM CONTENDING THAT THE MATTER WAS NOT ARBITRABLE. Having taken part in the arbitration, he may object to the confirmation of an award only on one or more of the grounds specified in subdivisions 1-4 of sec. 1462 C.P.A. These permit objections only on the grounds of fraud, misconduct, partiality or exceeding authority on the part of the arbitrator. *National Cash Register Co. v. Wilson (as Pres., Cayuga Lodge No. 1607, IAM)*, 8 N.Y.2d 377, 208 N.Y.S.2d 951 (1960).

REQUIREMENT OF PRESENTING WRITTEN CLAIM TO BOARD OF EDUCATION WITHIN THREE MONTHS AFTER THE ACCRUAL OF THE CLAIM, APPLIES TO ARBITRATION, whether a claim for damages is involved or not. Any claim made against the Board of Education which is "related to district property" and involves "rights and interests" of the Board comes within the purview of the three month time limit of section 3813 (1) of the Education Law. *Board of Educ. of Central School Dist. v. Minstein Construction Co.*, 12 App. Div.2d 40, 207 N.Y.S. 2d 858 (Third Dep't. 1960).

FAILURE TO APPOINT AN ARBITRATOR WITHIN SPECIFIED TIME LIMIT DID NOT WARRANT EXCLUSION OF SAID ARBITRATOR FROM HEARINGS. The contract provided that if a party refused to appoint an arbitrator within thirty days after a claim for arbitration was made, the arbitration might be held ex parte by the other party's appointed arbitrator. The United States District Court for the Eastern District of Kentucky, 177

F. Supp. 123, refused to restrain the arbitration held by one party after the other party's failure to appoint an arbitrator within thirty days. On appeal the court reversed, saying: ". . . the controlling consideration in this case is that, in the provisions of the arbitration agreement relating to the time within which appellant was to appoint its arbitrator, time was not of the essence of the contract." *Texas Eastern Transmission Corp. v. Barnard,* 285 F.2d 536 (6th Cir., McAllister, Ch. J., 1960).

ARBITRATORS MAY GRANT EQUITABLE RELIEF IN THE NATURE OF DECLARATORY JUDGMENTS. The employer objected to arbitration because the items involved were not specific grievances, but the court said even though the union is really asking for relief in the form of a declaratory judgment, "This is just as desirable here as in any other legal proceedings, inasmuch as it may avert constant bickering of specific grievances." *Columbia Broadcasting System v. Local 1212, Int'l Brotherhood of Electrical Workers,* 205 N.Y.S.2d 85 (Sup. Ct. 1960).

V. THE PROCEEDINGS

MOTION FOR SUMMARY JUDGMENT IS A WAIVER OF THE RIGHT TO PROCEED BY ARBITRATION. "Participation in a trial constitutes a waiver of arbitration, even though participation is limited to a motion for summary judgment." *Board of Educ. v. Mancuso Bros.,* 25 Misc.2d 122 (Sup. Ct. 1960).

STATE COURT LACKS AUTHORITY TO STAY FEDERAL COURT ACTION PENDING ARBITRATION OF DISPUTES. Petitioner sought to stay a federal proceeding pursuant to Section 1451 N.Y.C.P.A. claiming the controversy is one which should be resolved by arbitration. The court held: "Even if a valid arbitration agreement existed, it would seem that the court is without power to stay the federal proceeding." *S.M. Wolff Co. v. Tulkoff,* 204 N.Y.S.2d 879 (Sup. Ct. 1960); aff'd, 203 N.Y.S.2d 1020 (First Dep't. 1960).

CHAIRMAN OF AN UNINCORPORATED ASSOCIATION HAS THE RIGHT TO DEMAND ARBITRATION ON BEHALF OF THE ASSOCIATION, where the group does not have any officer denominated "president" or "treasurer" and the presiding officer exercises all the functions normally exercised by a president. *Pasch v. Chemoleum Corp.,* 209 N.Y.S.2d 191 (Sup. Ct. 1960).

COURT ORDERS JURY TRIAL ON ISSUE OF "FAILURE TO COMPLY" WITH CONTRACT CONTAINING ARBITRATION AGREEMENT. Where petitioner requested the court to appoint an arbitrator to resolve partnership disputes under a contract providing for such relief, and an issue is raised as to failure to comply with conditions in the contract, the court may order a jury trial on that issue before deciding whether to compel or stay the arbitration. *Kesten v. Cooper,* 25 Misc.2d 760, 206 N.Y.S.2d 424 (Sup. Ct. 1960).

ATTACHMENT PROCEEDINGS MAY BE HAD IN ADMIRALTY ARBITRATION, but it is necessary that the goods to be attached be within the territorial jurisdiction of the court. Therefore where a libel directed service of process in Manhattan, it was clearly not within the jurisdiction of the Eastern District of New York. *Ships & Freights, Inc. v. Farr, Whitlock & Co.*, 188 F. Supp. 438 (E.D.N.Y. 1960).

DEFENDING COURT ACTION ON THE MERITS AMOUNTS TO WAIVER OF THE RIGHT TO ARBITRATE. A corporation which defended a lawsuit thereby waived the arbitration clause in the agreement of a trade association of which it was a member, though it was ignorant of the clause. *Bel-Rose Fashions v. Braunheim*, 25 Misc.2d 1037 (Sup. Ct. 1957).

VI. THE AWARD

COURT UPSETS ARBITRATION AWARD WHICH DIRECTED EMPLOYER TO NEGOTIATE WAGE INCREASES WITH DECERTIFIED MINORITY UNION. The court concluded that a union cannot exercise a right of representation it no longer possesses and the employer should not be forced to commit an unfair labor practice by dealing with the union as the representative of the employees. "Under the circumstances, it seems appropriate to refer the entire matter back to the arbitrator who may reframe the award . . . he may order the employer to negotiate the wage question with the employees directly or with any properly constituted committee or representative of the employees." *Glendale Mfg. Co. v. Local No. 520 ILGWU*, 283 F.2d 936 (4th Cir. 1960).

ARBITRATION AWARDS MAY BE ENFORCED IN ADMIRALTY COURTS. A vessel owner and consignee of cargo agreed to arbitrate differences arising out of maritime difficulties in London. The admiralty court had jurisdiction of a suit to recover the amount of the arbitration award rendered in such arbitration. *Cia. Naviera Somelga, S.A. v. M. Golodetz & Co.*, 189 F. Supp. 90 (D. Md. 1960).

UNDER FEDERAL LABOR ARBITRATION LAW THE COURTS MAY NOT REVIEW THE MERITS OF AN AWARD. In determining whether to enforce an arbitration award courts must apply federal substantive law fashioned by the policy of national labor law. Under this policy as laid down by the Supreme Court a dispute must be held to be arbitrable unless it can be stated with positive assurance that it is excluded by the contract, and any doubts are to be resolved in favor of coverage. *Textile Workers Union of America v. Cone Mills Corp.*, 188 F. Supp. 728 (M.D. No. Car. 1960).

COURT ORDERS SUBSTITUTE FOR DECEASED PERSON APPOINTED TO SUPERVISE LIQUIDATION OF PARTNERSHIP BY ARBITRATION AWARD. "Such a substitution would not be a substantive change of the award and judgment. It would be an exercise of the court's power to carry the judgment into effect." *Martz v. Martz*, 209 N.Y.S.2d 617 (2d Dep't. 1961).

PENNSYLVANIA SUPREME COURT HOLDS "THAT THE EVENT WHICH STARTS THE RUNNING OF THE THREE MONTHS TIME WITHIN WHICH THE PARTY MOVING TO VACATE OR MODIFY THE AWARD MUST FILE HIS NOTICE OF MOTION IS THE DELIVERY OF THE AWARD TO THE PARTIES." The lower court held that the three month time limit began to run from the date the award was "filed" with the motion to confirm. This ruling, said the Supreme Court of Pennsylvania, would mean that an award could be vacated at any time within three months after a motion for confirmation was made. Thus, if a motion to confirm was not made for a year, the court would be obligated to entertain a motion to vacate made fifteen months subsequent to the rendition of the award. . . . This result cannot be sanctioned. Arbitration should be a quick and easy mode of obtaining justice." The judgment was therefore reversed and the record remanded for entry of judgment on the arbitration award. *Emporium Area Joint School Authority v. Anundson Construction and Building Supply Co.*, Supreme Court of Pennsylvania (Eastern District), Nos. 48, 49, January Term 1961, Dec. 1, 1960 (Cohen, J.).

OHIO ARBITRATION AWARD WHICH DID NOT MAKE REFERENCE TO THE FORUM IN WHICH THE AWARD COULD BE ENFORCED WAS NOT A STATUTORY ARBITRATION. The court therefore refused to grant confirmation of the award under its arbitration statute pursuant to Chapter 2711 of the Ohio Revised Code, affirming a judgment digested in *Arb. J.* 1959, p. 219. *Ockrant v. Railway Supply & Mfg. Co.*, 111 Ohio App. Reports 276 (Court of Appeals for Hamilton County, 1960).

SUBSTANTIAL COMPLIANCE WITH CALIFORNIA ARBITRATION STATUTE HELD SUFFICIENT TO ALLOW COURT TO CONFIRM AWARD. Where an arbitration was held under the by-laws of a Board of Realtors and one party requested and obtained a new hearing on the matter, this amounted to a new arbitration held other than under the by-laws and by other arbitrators. Thus the new arbitration could be considered a statutory arbitration where the award could be confirmed in a summary procedure. *Goossen and Bay and Beach Realty, Inc. v. Adair*, 8 Cal. Rptr. 855 (Dist. Ct. of Appeal, Fourth Dist. 1960).

WISCONSIN COURT UPHOLDS ARBITRATION AGREEMENTS IN CONSTRUCTION CONTRACTS. Agreements to submit future disputes to arbitration are enforceable under Wisconsin law, and awards can be challenged only on statutory grounds. The court said awards of arbitrators are "final and binding upon the parties unless the decision is impeached for fraud, accident, or gross mistake of such a nature that fraud may be inferred." *E. H. Marhoefer, Jr., Co. v. Mount Sinai, Inc.*, 190 F. Supp. 355 (E.D. Wisc., Grubb, D. J., 1961).